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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL
DISTRICT, ET AL.,

Appellants

v.

DEMETRIO P. RODRIGUEZ, ET AL.,

Appellees

On Appeal from the United States District Court
for the Western District of Texas

BRIEF FOR APPELLEES

QUESTION PRESENTED

Whether Article VII, §3 of the Constitution of the State of Texas and the sections of the Texas Education Code relating to the financing of public education violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Plaintiffs, who are the appellees, are parents and children residing in the Edgewood Independent School District, which is located within the city of San Antonio and Bexar County, Texas. Plaintiffs represent the classes of all other children and parents of Mexican-American descent who live in the Edgewood Independent School District, all children and other persons living in the Edgewood Independent School District, and all other children and parents living in Texas independent school districts, who are members of minority groups or who are poor. Defendants are members of the State

Board of Education, the Commissioner of Education, the Attorney General of the State of Texas, and the Bexar County School Board Trustees.

Plaintiffs allege, and the Trial Court held, that the Texas system of financing public elementary and secondary education violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against plaintiffs and the classes they represent. That system makes educational expenditures a function of the wealth of the family and of the district, and ensures that poor and minority group children will be afforded an inferior opportunity. This discrimination is accomplished through a combination of local property taxation, which allows districts with high property values to raise more dollars for education than districts with low property values (at lower rates of taxation), and a state Foundation School Program (formerly entitled Minimum Foundation Program) which fails to compensate for the inequalities in fiscal capacity among school districts.

The Trial Court held that the Texas school financing system discriminated against children living in poor districts and declared unconstitutional the Texas financing system as violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. It enjoined enforcement of the Texas laws on the financing of education "insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the state as a whole." (A. 273). It stayed its mandate for two years in order to give the Defendants and the Legislature an opportunity to take all steps necessary to make the financing system compatible with the Fourteenth Amendment. (A. 273).

SUMMARY OF ARGUMENT

The State of Texas has set up a state-wide system of public education pursuant to Art. VII, §1 of the Texas Constitution. It has created school districts, defined their boundaries and allowed property values in each district to effectively determine the amount of money available for education of the children in the district. In Texas, children must attend school. Texas Education Code, §21.032. In this manner the State has made the quality of education a child in Texas receives the function of the wealth of the district in which the child resides. Property values in districts vary widely, ranging from \$500,000 of property per student to less than \$10,000 per student. Because of these disparities in district wealth, the education provided in the schools in poor districts is vastly unequal to that provided in affluent districts. See *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); and *Missouri ex rel Gaines v. Canada*.

Plaintiffs contend education is a fundamental interest. Plaintiffs further aver the discrimination against people living in poor districts, the poor and minorities, constitutes a suspect classification. The weight of this discrimination falls upon helpless children and the State has come forward with no compelling or substantial justification for its discrimination.

Plaintiffs further contend that the Texas system does not bear some rational relationship to a legitimate state purpose. The defendants urge rationality on the ground the system permits local determination of the amount of money to be spent on the basis of parental motivation. The evidence shows in fact that in Bexar County and state-wide the poor districts make the highest tax effort (tax at the highest equalized rates)

and have the least revenues, while the wealthy districts tax at the lowest rates and have the most revenues. The result is the districts making the highest effort afford the lowest quality of education, while those districts making the lowest effort are able to afford the highest quality of education in Texas.

PART A

ARGUMENT

1. BACKGROUND OF LITIGATION

Suit was filed on July 10, 1968. A Three Judge Court was duly convened, preliminary hearings relating to parties were held, and amendments of pleadings were filed which added parties and which responded to defense motions for a more definite statement. Thereafter, defendants filed a Motion to Dismiss challenging the allegations in the complaint on the ground plaintiffs failed to state a cause of action. The Trial Court overruled the Motion to Dismiss on October 15, 1969.

The defendants continually assured the Trial Court that the Legislature of Texas would address itself to the school finance problems raised by this case. At a hearing before the Trial Court held on October 2, 1969, plaintiffs sought prompt trial contending that the suit and the report of the GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION (1968) (Plaintiff's Exhibits XVIII a-i cited in Appellant's Brief at pp. 10 and 11, hereinafter referred to as Report of the Governor's Committee) were known to the Legislature which convened in January and adjourned in May, 1969 and that the 1969 Legislature had failed to act.¹ Defendant's position after the 1969 session was

¹Plaintiffs introduced the testimony of State Senator Bernal that in his opinion the Legislature would not act in this century. (Docket #133).

that the Legislature had an obligation, duty and responsibility to work on the matters of which plaintiffs complain and that the Legislature would make changes and would take action if trial were delayed. (Hearing, Oct. 2, 1969, Docket #134, page 24, ll. 14-18). The Trial Court was familiar with the Report of the Governor's Committee and stated in its Order of October 15, 1969, that it was aware the Legislature had authorized the appointment of a committee to study the Public School System of Texas and to recommend legislative action. (A. 269). On the basis of this information, the Court held trial on the merits in abeyance, pending action by the 62nd Legislature convening in January, 1971, and directed defendants to advise the Court and plaintiffs, at least once each 90 days, of the progress being made by the Committee and the Legislature with respect to this matter. (¶8, A. 41-42).

The Trial Court's concern for legislative action was further demonstrated by the Court's Show Cause Order relating to the failure of defendants to file progress reports on the actions of the Legislative Committee as required by the Court's October 15 Order. (Docket #140). It was agreed in the Pre-Trial Order (¶32, A.55) and in open court that the 62nd Legislature convened in January, 1971, and adjourned at the end of May, 1971, without taking any action with respect to the issues raised by this case. (A. 269). This inaction prompted Judge Adrian Spears to make the following remarks:

I think it is a little disconcerting to a Court, when it abstains and does it on specific grounds that it wishes for the Legislature to do something about it, and with education as important as it is to the citizenry of our State and our Nation, for the Legislature to completely ignore it, it makes you feel that it just does no good for a court to

do anything other than, if it feels these laws are suspect, declare them unconstitutional; then make the Legislature take action, which they don't seem to want to do unless they are forced to do it.

Hearing before Court held December 10, 1971, p. 24.

Contrary to defendants' inference that the State of Texas has constantly reviewed and revised its school finance procedures, there has been no educational reform in Texas since 1949. (148, A. 57; Report of the Governor's Committee, Exhibit XVIIIa, p. 20; Graham Deposition, p. 27, ll. 12-16). The 1969 codification of the Gilmer-Aiken Act, carried over the school financing law practically verbatim, including some provisions relating to segregation. (A. 287, 291). Thus, despite the defendants' intransigence and its unwillingness to offer the poor an equal educational opportunity, the Trial Court acted with care, as well as restraint. It gave defendants ample opportunity to respond through the legislative process to plaintiffs' grievances. Moreover, when the lower court declared unconstitutional the Texas school financing plan, it allowed the State of Texas two additional years to put its house in order.

2. THE RECORD

The Trial Court in its 1969 Order allowing two years for the Legislature to act also ordered the parties to proceed with preparation for pre-trial and trial, giving that additional time to prepare for trial. The record is clear and complete. It contains the testimony of nine witnesses and 19 exhibits, including graphs, charts and reports. The evidence presents a full picture of the operation of the Texas education system in both narrative and statistical form. The statistical evidence is derived primarily from information supplied by the Texas Education Agency and from the Report of the

Governor's Committee.

Listed below are plaintiffs' witnesses including the primary thrust of their testimony. Most of the direct testimony of plaintiffs' witnesses was prepared in narrative form and submitted to defendants' counsel on October 5, 1971. Their depositions were taken between October 6, 1971, and October 20, 1971, at which time the respective narrative statements were formally introduced as a portion of the testimony of the witnesses. This narrative testimony is contained in the Appendix at pp. 193-258.

Witnesses:

Dr. Joel Berke, Director of Education Finance and Governance Program of the Policy Institute, Syracuse University, The Texas School Financing System (Docket #173, A. 193)

Dr. Jose Cardenas, Superintendent of Schools, Edgewood Independent School District:
The Effect of Inequitable School Financing.
(Docket #176, A. 234).

Dr. Don Webb, Associate Professor of Economics, Trinity University: Local School Financing.
(Docket #175, A. 222).

Dr. Daniel C. Morgan, Jr., Associate Professor of Economics, University of Texas at Austin:
State Financing, Minimum Foundation Program.
(Docket #181, A. 241).

J. Richard Avena, Director of the Southwestern Field Office for the U. S. Commission on Civil Rights: Discrimination Against Mexican-Americans. (Docket #180, A. 231).

Dr. Charles Feldstone, Director of Computer Program, Trinity University: Per Capita and Family Incomes. (Docket #175).

Plaintiffs' exhibits were introduced on October 5, 1971, and are identified in Appendix A of this Brief. Defendants introduced the depositions of Dr. J. W.

Edgar, a Defendant, the Commissioner of Education (Docket #179), Dr. John Stockton (Docket #178), and Leon Graham (Docket #177).

Defendants have largely ignored the record in the case. Rather, they rely upon hearsay material not introduced in evidence, including statistics from states other than Texas. For example, defendants attack the testimony of Dr. Berke, who was cross-examined at trial, by referring to an article not subject to cross-examination. (Appellants' Brief, pp. 21-22). After fully participating in a long and thorough adversary proceeding that contained the testimony of many witnesses and at least 100,000 pages of statistics and materials, defendant should not be permitted to retry the case before this Court with material that would not be admissible before the Trial Court. Their approach is contrary to the purpose of a trial, to the rules of evidence, and to accepted trial procedure.

3. THE STATE FINANCING SYSTEM

Article VII, §1 of the Texas Constitution mandates a public free school system. Pursuant to this mandate, the State of Texas has established a system of public schools, and it has created school districts for the convenience of the state in maintaining the public schools. (Stipulation 16, A. 53). State funds supporting the Texas system (the state financing system) come from two sources: (1) Ad Valorem property taxes assessed by local school districts, and (2) Foundation School Program Funds (including the Available School Fund). (Stipulation 18, A. 53). The state has delegated the power to each independent school district to levy and collect property taxes for maintenance and operation of their respective school systems, within statutory and constitutional limits. (Stipula-

tion 19, A. 54). Each independent school district levies and collects taxes on property within its district. (Stipulation 20, A. 54). The money collected by such districts must be used solely within the district in which it is collected under the requirements of Article VII, §3 of the Texas Constitution. (Stipulation 20, A. 54).

The State provides approximately 50% statewide of the public school education funds. This is done through the Foundation School Program and Available School Fund. The Foundation School Program formulas effectively determine the amount of funds a school district will receive from the State. (See Stipulation 21, A. 54). Distribution of state funds to local districts is made in a two-step process. First, the districts receive a per pupil uniform payment from the Available School Fund (\$98 per pupil in 1968). The amount of each district's Foundation School Program entitlement is then calculated. Next, the amount of the Available School Fund payment is subtracted from the Foundation School Program and distribution of the balance of the Foundation School Program Funds is made from the State to the local districts. (Graham Deposition, p. 9, l. 18; Morgan Deposition, pp 44-45, p. 71 ll. 16-19). Thus, there are two separate payments, the Available School Fund payment and the Foundation School Program payment (reduced by the amount of the Available School Fund payment), the sum of which equals the amount due the local districts from the State under the Foundation School Program formulas. The Available School Fund is a revenue source, but plays no effective part in determining the amount of money the district receives.

The Foundation School Program has three major divisions: (1) Personnel salaries, (2) Maintenance

and operation, and (3) Transportation. More than 80% of the Foundation School Program (the State's outlay to the school districts) is for payment of teachers' salaries (A. 244). The teachers' salary schedules are a matrix, with the higher salaries going to the teachers with (1) the greater number of years of schooling and degrees, and (2) the greater number of years of teaching experience. (A. 244).

The more a local district puts into teachers' salaries, the more "qualified" its teachers will be according to State standards of qualifications. The more money a school spends on teachers' salaries, the greater its Foundation School Program allocation. The system is essentially an incentive matching approach to state aid. (A. 242). The wealthy district can pay higher salaries and thereby acquire more qualified teachers. The wealthy districts can also hire more teachers because they have more funds. (See A. 237). The Texas system thus enables the affluent districts to acquire "higher quality" teachers and more of them (A. 237) and thereby to qualify for more funds under the Foundation School Program than the poor districts. (A. 244).

The State pays 80% of the Foundation School Program costs and the local districts are responsible for the balance (the Local Fund Assignment). That balance is apportioned according to an economic index. As described by Appellants, this index apportions the local funding according to the wealth of the district.¹ Using a low tax base and a high tax base district as examples, a dollar comparison of this Foundation School Program will illustrate how the Local Fund Assignment works. The figures are derived from the

¹The Trial Court recognized that the economic index has come under increasing criticism, including criticism in the Report of the Governor's Committee. (A. 260).

attachment to the Graham Deposition for the 1970-1971 school year.

District	Property Value Per Student	State Funds Per Student (Founda- tion School Program minus Local Fund Assignment 1970-1971)	State Foundation School Program Per Student 1970-1971
Edgewood	\$ 5,429	\$350	\$356
Alamo Heights	\$45,095	\$393	\$491

The above chart includes only State Foundation School Program Funds. It does not include the funds raised by the District's local tax paying capacity. The chart clearly shows how, notwithstanding the economic index, poor districts receive fewer dollars from the State than rich districts.

4. IMPACT OF THE TEXAS SYSTEM FOR FINANCING PUBLIC SCHOOL EDUCATION

The effect of this financing system is that in Texas the tax base of the local school district determines the amount of educational dollars received per child. Dr. Berke in his testimony found an almost perfect state-wide correlation between the size of the tax base and the amount of educational dollars expended per child. To illustrate, portions of his testimony (A. 198-205) and of Plaintiffs' Exhibit VIII are reproduced below:

Market Value of Taxable Property Per Pupil	Median Family Income From 1960	Per Cent Minority Pupils	Equalized Tax Rates on \$100	Local Revenues Per Pupil	State Revenues Per Pupil	State & Local Revenues Per Pupil
Above \$100,000 (10 Districts)	\$5,900	8%	\$.31	\$610	\$206	\$816
\$100,000-\$50,000 (26 Districts)	\$4,425	32%	.38	287	257	544
\$50,000-\$30,000 (30 Districts)	\$4,900	23%	.55	224	260	484
\$30,000-\$10,000 (40 Districts)	\$5,050	31%	.72	166	295	461
Below \$10,000 (4 Districts)	\$3,325	79%	.70	63	243	306

The above exhibit further shows that the poor districts

are taxing at higher rates than the affluent districts. In fact, the evidence is irrefutable that in Bexar County, as well as throughout the State of Texas, the districts with the least revenue per student are making the greatest tax effort.

Moreover, poor people generally reside in poor districts. The foregoing exhibit supports the Trial Court's finding:

As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor districts are poor in income and predominantly minority in composition. (A. 262).

In Bexar County (metropolitan San Antonio) this is shown in Plaintiffs' Exhibit III (A. 76) and Chart #2 (A. 227) below:

School District	Property Value Per Student	% Anglo-American	% Mexican-American	% Negro	Median Per Capita Income	Median Income Per Household
A. 229	\$ 5,429	3.88	89.66	6.30	\$ 995.01	\$4,686.53
Edgw.	9,974	41.21	56.90	1.37	1,357.62	5,091.09
S. San	10,463	38.50	61.36	.10	1,453.70	5,553.16
Har.	19,659	26.71	58.52	14.48	1,493.33	4,928.87
SAISD	20,330	82.07	15.79	1.71	2,042.75	7,313.07
N'rs'de	27,317	91.99	7.38	.10	2,618.05	8,927.56
N'reast	45,095	85.15	14.15	.42	2,807.59	8,001.64

The poverty of Mexican-Americans in Texas is shown. (A. 232). Plaintiffs' Exhibit X (A. 98) below, shows the statewide discrimination as to them:

EXPENDITURES PER PUPIL IN ADA IN TEXAS

Districts 10 percent or more Mexican American
with total enrollment 300 pupils or more
(Expenditures are from State and local revenue only)

Percent Mexican American of District Enrollment	Districts in Sample Number of Districts	Per Pupil Expenditures	Estimates for All Districts Number of Districts	Per Pupil Expenditures
10-19.9	55	\$457	85	\$444
20-29.9	38	484	59	477
30-49.9	32	444	49	444
50-79.9	39	377	60	382
80-100	23	292	30	297

Defendants argue that the evidence of Dr. Berke identifying the nexus between income and property values could be construed to show that the disparities between the very rich districts and the very poor districts are dramatic but not numerically significant. The argument defeats itself. Plaintiffs do not contend that the poor districts in Texas are other than a minority of the districts. This is shown in Plaintiffs' Exhibit VII. (A. 77).

Defendants, with income and wealth data available at all times, did not produce evidence that called into question the evidence of the plaintiffs. Now defendants indicate that these statistics may possibly point out some "state peculiarity" that results in the poor and minorities being in rural districts. (Appellants' Brief, p. 24). The foregoing chart on Metropolitan San Antonio, which has a population of approximately 850,000 people and is the residence of the plaintiffs refutes this contention.

The defendants' witnesses took the position that the poor districts have the poor people. Defense witness, Dr. Stockton, testified that a district's assessed valuation is a reasonably accurate measure of income within a district. (Deposition, p. 21). Mr. Graham, testifying for the defendants, stated that the poor districts have the greater numbers of disadvantaged children. (Deposition, pp. 49-50).

An illustration of how the Texas system works in Bexar County is found in the testimony of Dr. Webb (A. 222-230) and in the chart provided below. For each column the most recent figures in evidence are used. The seven school districts below have 93% of the public school students in Bexar County, and all are in the Metropolitan San Antonio (a single urban eco-

nomic area whose citizens reside and work within it). (A. 222).

District	Equalized Tax Rate 1970 A. 226	Property Value Per Student A. 229	Local Funds Per Student 1969-70 A. 175-184 et seq	Median Per Capita Income 1969 A. 237	State Funds Per Student (Foundation School Program Funds Minus Local Fund Assignment) 1970-71 Graham Deposition Not provided	State Foundation School Program Funds Per Student 1970-71 Graham Deposition Not provided
Edgewood	1.05	\$ 5,429	87	\$ 995	\$350	\$354
South San	1.00	9,974	97	1,357	351	367
Harlandale	.89	10,463	84	1,453	Not provided	Not provided
SAISD	.76	19,659	160	1,493	361	407
Northside	1.02	20,330	144	2,042	370	461
Northeast	.90	28,317	239	2,618	362	423
Alamo Heights	.85	45,095	412	2,807	393	491

The Alamo Heights and the Edgewood Districts are here used for comparison. Edgewood makes the higher tax effort, taxing at an equalized rate of \$1.05 per \$100 valuation while the Alamo Heights rate is \$.85. (A. 226). For the 1969-1970 tax year, Edgewood was able to raise only \$37 per student in local taxes while Alamo Heights was able to raise \$412 per student. The reason this disparity exists is because Edgewood has \$5,429 of property per student and Alamo Heights has \$45,095 of property per student.

The sums available for public school education are determined by local Ad Valorem property values. Dr. Cardenas notes that Edgewood's low tax base reflects a district that is mostly residential, having poor people living in poor housing (the average tax collection in Edgewood is \$31.50 per annum) with an almost total absence of commercial property. Residential values assist a school, but all Texas districts necessarily rely heavily on revenues from commercial property to support their schools. (Cardenas Deposition, pp. 21-24).

It is effectively impossible for poor school districts to

raise the revenues per student that affluent school districts are able to raise since an increase in Ad Valorem taxes is the only means that poor school districts have to raise more revenues. This impossibility is described by Dr. Berke and in the following Tables (A. 206-207). The hypothetical yield relates to yield if highest tax rate is applied to all districts. The column indicating the tax rate needed to equal highest yield shows it is necessary for the average school in the poorest category to tax at 20 times the rate of the average school in the wealthy category to achieve the same tax yield.

Categories Market Value of Tangible Property Per Pupil	Tax Rate Needed to Equal Highest Yield	Hypothetical Yield of Highest Tax Rate Per Pupil
Above \$100,000 (10 Districts)	\$.64 per \$100	\$2,356
\$100,000-\$50,000 (26 Districts)	1.49 per \$100	918
\$50,000-\$30,000 (30 Districts)	2.58 per \$100	519
\$30,000-\$10,000 (40 Districts)	4.88 per \$100	292
Below \$10,000 (4 Districts)	12.83 per \$100	108

The defendants contend "this is not like *Hargrave v. Kirk*, 313 F. Supp. 944 (N.D. Fla. 1970), *vacated* 401 U.S. 476 (1971), where the state made it impossible as a matter of law for a poor family or school district to provide an expensive education." In Texas the maximum rate for school maintenance is \$1.50 per \$100 valuation. Texas Education Code, §20.04 (d). The poor districts, as shown above, would have to tax at several times that rate to make available the revenues available in wealthy districts. The Texas system makes it impossible for poor districts to provide quality education in fact as well as in law.

The Foundation School Program has little, if any, equalizing effect with respect to the variations created by the State's wealth classification. Dr. Daniel C. Mor-

gan (A. 241-242) states the Foundation School Program: (1) does not equalize the capacity of school districts to support education, (2) does not place a lower effective tax burden on the poor children, and (3) does not mandate some level of either education per child or money expenditure per child. Additionally, as Dr. Joel Berke testified and the court below held, whatever mild equalizing effect that state aid may have, it does not operate in favor of the poorest districts. (A. 206, A. 262).

5. MINORITY GROUP DISCRIMINATION

The minority group discrimination recognized by the Trial Court (A. 262) is substantiated by the evidence. Separate schools for minority children were long a part of the Texas system. Mr. Richard Avena, Director of the Southwestern Field Office of the United States Commission on Civil Rights, (A. 231-233) summarizes the discrimination that has long existed against Mexican-Americans in Texas. He testified that there was discrimination in the fields of education, housing, employment and civil rights. In some areas of Texas, separate schools have been provided for Mexican-American students. (Deposition, Edgar, p. 10). The state education agency was enjoined from participation in the segregation of Mexican-Americans at the time Dr. Edgar joined the agency. (Deposition, Edgar, p. 11). This segregation in housing and education is reflected in the distribution of education dollars. All relevant evidence substantiates plaintiffs' contention that the districts with the highest percentages of Mexican-Americans and Blacks are low expenditure districts, while those with few minority people spend substantially more per student for education. Statewide it is shown at A. 198-200, and in Exhibit X:

Expenditures Per Pupil in A.D.A. in Texas in Districts with 10% or more Mexican-American enrollment, at A. 98 (also introduced as Berke, Chart #1, A. 203) and in Bexar County the parallel is shown in Plaintiffs' Exhibit III, A. 76, and Table VII, A. 216.

It is no historical accident that 90% of the school children in Edgewood are Mexican-Americans and Edgewood is the poorest district within metropolitan San Antonio. Mr. Avena testified this is the result of state-enforced Deed restrictions that barred Mexican-Americans from any but the poorest neighborhoods (A. 232) prior to *Shelley v. Kraemer*, 344 U.S. 1 (1947). See also, Title 42, U.S.C. §3601, et seq. (Fair Housing Act of 1968).

The defendants assert two propositions to justify the present Texas system:

1. The Defendants contend that the Texas system assures each student a minimum educational program.

2. Defendants contend that money does not make a difference in the quality of education a school can provide its children.

Plaintiffs here review the evidence relating to the foregoing contentions in the above order.

6. THE STATE FOUNDATION PROGRAM DOES NOT ASSURE A MINIMUM EDUCATIONAL PROGRAM

The Foundation School Program is a means of delivering dollars to the schools in a way that will assure the wealthier districts greater funds per pupil. (A. 196, A.242, A. 262). It does not relate to an educational program and it does not assure any minimum. (A. 242-243). The system provides in an incentive manner a portion of the teachers' salaries but it does not assure a district any particular number or quality

of teachers. The State Foundation School Program of financing does not relate to general educational quality or physical facilities for education. Indeed, the State does not maintain data on the courses offered in the schools (A. 136), dropouts and withdrawals (A. 120-121), teaching aids and equipment (A. 145), extra-curricular activities, such as music, drama, and art (A. 146), hours of education (A. 146-147), educational achievement (A. 154), physical plant and teaching facilities (A. 129 and A. 146). Both Dr. Morgan and Dr. Berke testified that the State does not provide a minimum educational program. (Dr. Morgan: A. 242-245, Deposition, pp. 43 & 52, l. 7, et seq.; Dr. Berke, Deposition, Answer 17, p. 9, Answers 48-51, pp. 22-24, Answers 88-89, pp. 41-42).

The minimum the defendants referred to at trial is merely the least amount any school raises or receives from the State. (Morgan Deposition, p. 49, l. 16 - p. 50, l. 2, and p. 43, ll. 9-18). Defense counsel made clear in his cross-examination of Professor Morgan that the minimum provided by the program is whatever the school at the "bottom" receives:

"Q. Well, everything on the bottom has got to be equal, hasn't it, Dr. Morgan?"

"A. If you are asking me... if there is some amount in every district, almost all the 1200 districts have some amount of money down there - and that is about it."

"Q. That's the minimum, isn't it?"

"A. If you want to define that as a minimum the answer is 'yes'." (p. 53, ll. 9-18).

7. THERE IS A CORRELATION BETWEEN MONEY AND THE QUALITY OF EDUCATION A DISTRICT IS ABLE TO PROVIDE ITS STUDENTS

Defendants deny that dollars spent on education

have anything to do with the quality of education which a school will be able to offer poor children. No evidence was introduced at trial to support this contention, while both plaintiffs and defendants introduced evidence which showed the correlation between money and quality in education.

The State, defendants' counsel, and defendants' witnesses have maintained that money makes a difference. The State by its own actions asserts that money makes a difference in the quality of education a school is able to provide. (Report of the Governor's Committee, pp. 14, 40 & 58-76; Morgan Deposition, p. 59, l. 15, p. 63, p. 66, l. 21, p. 67, p. 68, ll. 10-17). The State set up the Foundation School Program that puts more than one billion dollars annually into the Texas public school system. (§ 40, A. 56). The State program is designed to pay more money to teachers in order to get higher quality teachers (Chapter 16, Texas Education Code; A. 294-305; A. 326-327; A. 244). The State has created a system to permit local districts to put another one billion dollars into the state education system.

Defendants' witnesses, employees of the State, acknowledged the correlation between money and quality. (Edgar Deposition, p. 15, ll. 7-15; Graham Deposition, p. 46, ll. 3-19). They mention that other factors also relate to the quality of education a school is able to provide. Dr. Edgar states that other factors include qualifications of teachers, capacity and abilities of the administrators, and the adequacy of the facilities. (Deposition, p. 15). It is apparent, as plaintiffs' witnesses testified, that the foregoing largely relates to the amount of money the district is able to spend for such personnel and facilities.

The defendants' counsel claims that money makes a difference. Defendants urged the Supreme Court to note probable jurisdiction because it is unlikely that those whose children now enjoy high quality education would sit happily by as the quality of that education is reduced. (Jurisdictional Statement, p. 8). In the Trial Court, the defendants argued a decision in favor of plaintiffs' could cause a reduction of funds in some districts thereby reducing the quality of education provided in those districts.

The evidence is clear, unequivocal, and uncontroverted that the quality of education a school is able to provide relates to the amount of funds that school has available for educating the school children. Dr. Cardenas points out the relationship of money and quality education. He compares Edgewood with a neighboring district comparable in size. The other district, Northeast, is wealthier, but not the wealthiest in Bexar County. It is able to provide approximately three times the library books per child. (A. 236). The average classroom size is 19, while Edgewood has an average class of 28 students. (A. 237; see also Berke Deposition, Answer 107, p. 49). He points out the great need of small classes in many courses. Edgewood cannot afford a comparable curriculum. (A. 237-238). He cites the great turnover in teachers at Edgewood (A. 237), and for the sample year, 52% of the Edgewood teachers did not have proper teaching certificates (teachers with emergency permits), while at Northeast there were only 5%.

The wealthier districts in Bexar County are able to provide three to four times more counsellors in relation to students. (A. 237). Dr. Cardenas also enumerates some of the teaching aids that are provided in other districts that Edgewood cannot afford. (A. 238).

Northeast is able to provide $1\frac{1}{2}$ times more square footage of space per student for education. (A. 236). Moreover, Edgewood cannot properly maintain its buildings with its small budget and the Edgewood child may find himself in one of the school buildings with a leaky roof because the district does not have the funds to repair the roof. (A. 236). All of these disparities, he testifies, exist because of Edgewood's lack of funds. (A. 234-235).

Dr. Berke recognizes the relationship of district wealth to educational quality (Deposition, Answer 18, p. 10) and enumerates some of the disparities which Edgewood suffers. He notes that the wealthier the district, the more qualified the professional personnel (A. 210; see also Deposition, Answer 67, p. 32, Answer 32, p. 16). He also points out that the richer the district, the higher the ratio of teachers per 100 pupils. (A. 210). This is pointed out statewide in Table VI (A. 211) and Graph V (A. 212). The relationship of teacher ratios are shown in Table VI (A. 211) and Graph V (A. 212). Dr. Berke says that the pattern in Bexar County is essentially identical to the pattern statewide (A. 210) and in Table XI (A. 220) he compares the Bexar County schools in relation to professional salaries, degree qualification, student counsellor ratios and professional personnel. (A. 220; Deposition, Answer 95-97, pp. 43-45). In the categories in which the State keeps data, the disparities in quality are shown (teacher qualifications, A. 114-119 & 181-182; counsellors, A. 130-131 & 183).

Dr Cardenas (A. 234-240, Deposition, p. 4, p. 49) and Dr. Morgan (A. 241-246, Deposition, p. 59, ll. 13-22, pp. 63-68) take the position that there is a direct correlation between the quality of education a school district may provide its children and the amount of

funds it has available. (See also Berke, A. 196, 209-210).

The result is manifest and uncontested. The testimony of Dr. Cardenas is that the student in the Edgewood school district is essentially of the same age, aptitude, motivation, and ability as the students in the other districts in Metropolitan San Antonio. (A. 235). He then notes that the high dropout rate of the Edgewood children and their lower achievement levels reflect the results of the present State financing system. (A. 238 & 240). Dr. Morgan, testifying on the effect of the Texas system, points out that statewide the children in the poor districts suffer in any comparison of indicators of educational quality, citing academic achievement, functional literacy, and number of years in school. (A. 241). The longer they are in school, he testifies, the greater the disparity. (Deposition, pp. 33-34). The Report of the Governor's Committee (p. 38) acknowledges the effect of these disparities.

Defendants do not state there is evidence to support their positions that money makes no difference. Defendants do say the following: "There was conflicting testimony before [the Trial Court] on whether quality of education can be measured by dollars and cents (Graham and Stockton depositions)." (Appellants' Brief, pp. 17-18). It should be noted that Defendants are not actually contending that Mr. Graham and Dr. Stockton testified that money makes no difference. Dr. Stockton, as an economist, testified only on the economic index and how it operates. He did not state or imply that the amount of money spent does not relate to the quality of education a school district can provide. On the other hand, Mr. Graham expounded upon the amount of money the State was putting into public school education to improve the quality of education.

While stating that money does affect quality (Deposition, p. 46), he said there are also other factors that relate to quality of education. Those factors he mentioned point up the need for money, i.e.: quality of teachers and quality of administrators. In fact, Mr. Graham and Defendants' counsel aver that local taxation is to allow local school districts to raise revenues to provide better quality education. (Deposition, p. 22, ll. 1-6, p. 71, ll. 15-21).

Defendants cite educational studies that recognize equal money alone cannot cure the damages caused by discrimination and deprivation. They translate this comment on the tragedy of discrimination to mean that in the education of those who reside in poor districts, money does not make any difference. Defendants then create a cynical syllogism: (a) since money does not make any difference in educating the poor or people in poor districts, (b) it is constitutionally permissible to continue to discriminate against those who have already been injured by discrimination.

Defendants on the other hand urge that great sums of money are necessary to maintain high quality education in wealthy districts. Their standard is that money makes no difference in the education of those who have suffered from discrimination, but large sums are required to educate those who are privileged to live in wealthy districts. The defendants have failed to give this argument any evidentiary support.

PART B

8. INTRODUCTION TO LEGAL ANALYSIS

As plaintiffs have detailed in Part A, the method of financing public schools in Texas is both irrational and discriminatory. The amount of money which is dedi-

cated by the state to the education of a child is contingent neither upon any characteristic of the child, nor upon the interest of the family and child in securing a quality education. Rather the accident of where the child lives, the accident of his family's wealth, and, even more clearly, the accident of neighbors' wealth determines his educational opportunity. The system is capricious and irrational. More than that, it is backwards: it favors the affluent and discriminates against those whose need is the greatest. The state denies to its children even the semblance of an equal start in life. Texas does not even guarantee a child a minimum or adequate education — the only minimum is what the lowest-expenditure district chooses to spend for education. Indeed, the State of Texas does not go so far as to monitor or accumulate data on the adequacy of local educational programs.

This came about as a result of State action. The State has set school district boundaries; the State has chosen to allow local districts to rely upon and retain all property tax revenues; the State-created districts have widely varying property values per student; the State, thereby, has made some districts poorer than others; the State does not distribute its aid to equalize expenditures; the State has chosen a program which discriminates against children living in poor districts — most of whom are poor and members of minority groups. This scheme is not necessitated by administrative convenience; it undermines, rather than enhances, local control; and it deprives substantial numbers of children of an equal educational opportunity.

Yet, as the defendants remind us, the fact that an enormous political and educational wrong has been visited upon large numbers of powerless children, does not necessarily invite judicial intervention. The injury

must amount to a constitutional deprivation to justify such intervention. The Court should not entertain any doubts as to the constitutional vitality of the plaintiffs' claims. Under the Equal Protection Clause of the Fourteenth Amendment, whether the Court applies the rational basis or the compelling state interest test, the Texas scheme for financing the public schools is unconstitutional. *Reed v. Reed*, 404 U.S. 71 (1971); *Weber v. Aetna Casualty and Surety Co.*, 92 S. Ct. 1400 (1972).

Defendants characterize these legal arguments as "simplistic," and, in a sense, the plaintiffs agree. The State has chosen to allocate education services, possibly the most vital service it provides, in a way which systematically deprives children living in poor districts of an equal educational opportunity. Plaintiffs are attacking a system of financing which creates a privileged group of beneficiaries, thereby depriving plaintiffs of the opportunity to achieve socio-economic success, to participate fully in the democratic process, to exercise their First Amendment speech rights, and to develop their intellects. This is particularly invidious where the class being adversely treated consists of children who are politically powerless and who are, for the most part, members of poor and minority group families. Thus, amidst all the "labels" and "tests", one inescapable conclusion justifies the intervention of this Court: the State of Texas has systematically deprived the poor and powerless of their only opportunity to escape the bonds of their environment and to participate fully in American life. Through the state created and operated public school system, Texas has chosen to reinforce the privilege of those already blessed with economic and political well being, turning relative advantage into a self-fulfilling prophecy.

9. THE COMPELLING STATE INTEREST TEST IS APPLICABLE

a. Introduction

As this Court recently reaffirmed in *Weber v. Aetna Casualty Co.*, 92 S. Ct. 1400, (1972), a variety of formulations of the requirements of the Equal Protection Clause have been evolved, depending upon the circumstances of the case and the interests at stake. *Dunn v. Blumstein*, 405 U.S. 330, (1972). Where a fundamental interest is at issue or inferior treatment is afforded a suspect class, the State must show that a compelling or substantial interest is being served that cannot be satisfied by some less onerous alternative. Mere rationality will not suffice. Thus, race and poverty have been characterized as "suspect" classifications, and voting, interstate travel, and fair criminal process as fundamental rights. See, e.g. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Bullock v. Carter*, 405 U.S. 134 (1972); *Weber v. Aetna Casualty and Surety Co.*, 92 S. Ct. 1400 (1972); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

b. Education is a Fundamental Interest

Although this Court has never expressly held that education is a fundamental interest, there is strong dicta to this effect. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Weber v. Aetna Surety & Casualty Co.*, 92 S. Ct. 1400 (1972). We begin with the often quoted, yet clearly applicable, encomium to education contained in *Brown v. Board of Education*, 347 U.S. at 493:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expen-

ditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

This passage from the *Brown* opinion sounds a theme at the heart of the American educational and political tradition. Education is a great deal more than a "nice-to-have" public service. *Palmer v. Thompson*, 403 U.S. 217 (1971) (Mr. Justice Blackmun concurring). The public schools have long been viewed as the inculcators of civic virtue, intelligence, and, equally as important, as a legitimate and peaceful instrumentality for socioeconomic mobility. See generally Silberman, *Crisis in the Classroom*, Chapter 3 (1970); Dewey, *Democracy and Education*, Chapter 9 (1968); Cremin, *The Genius of American Education* (1965). Horace Mann wrote:

Education then, beyond all other devices of human origin, is a great equalizer of the condition of men, — the balance wheel of the social machinery ... [It] gives each man the independence and the means by which he can resist the selfishness of other men. It does better than to disarm the poor of their hostility toward the rich; it prevents being poor.

Mann, *Twelfth Annual Report as Secretary of Massa-*

chusetts State Board of Education, in *Commager, Documents of American History*, 317, 318 (6th ed. 1958). This tradition of peaceful change demands that each child, irrespective of his background, through diligence and perseverance, and the opportunity afforded by the public schools, should be able to take his fair share of society's status and income rewards. As Professor Karst puts the point, "For generations education has been seen as one of the major paths for those who would be economically and socially mobile. Not only is it the gateway through which poor people enter into the middle class; it is also a gateway to the world, through which the child receives the culture." Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720, 722 (1972). See also Coons, Clune & Sugarman, *Private Wealth and Public Education* 364-366, 370-373, 387-393, 397-419 (1970); *Who Pays for Tomorrow's Schools: The Emerging Issues of School Finance Equalization*, 2 YALE REV. OF LAW AND SOCIAL ACTION 107 (1971).

In a highly complex society, with its "nuclear physicists, ballet dancers, computer programmers, [and] historians, formal training" is an absolute prerequisite to success. *Wisconsin v. Yoder*, 92 S. Ct. 1526, 1545 (1972) (Concurring opinion of Mr. Justice White). Thus, the importance of the educational interest, to the social and economic welfare of both the state and individual, demands its treatment as a fundamental interest. This fundamentality is manifested in many ways:

1. Education is essential to the maintenance of the free enterprise system; for it enables the individual to compete in the economic marketplace, irrespective of his socio-economic back-

ground, on an equal basis. The public schools are the great hope of the poor and minority groups; they represent their greatest opportunity to achieve economic security and social status.

2. Education is vital to the development of the individual. The educational system attempts "to nurture and develop the human potential of ... children ... to expand their knowledge, broaden their responsibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance," *Wisconsin v. Yoder*, 92 S. Ct. 1526, 1545 (1972) (Mr. Justice White concurring).
3. Education is universally relevant, and it is compulsory. §21.032, Texas Education Code. While most children, fortunately, do not receive welfare payments from the state, while many can avoid the necessity of calling the police or fire departments, virtually all children receive the benefits of public schooling. The contact generally occurs over a twelve year period, it is intensive, and it happens during the crucial formative years before adulthood.
4. Education is a vital element in the molding of personality; it shapes the attitudes and values which will be held by an individual throughout his lifetime.
5. Education is vital to the economic and political survival of the state; an educated populace allows a nation to compete and protect itself in the world community.

See generally *Serrano v. Priest*, 487 P. 2d 1241 (Cal. 1971).

While education is vitally important to the social and economic interests of the individual and the state, defendants urge that this very importance precludes the inclusion of education among those interests termed constitutional^{ly} fundamental. Defendants rely upon *Dandridge v. Williams*, 397 U.S. 471 (1970), for the proposition that

In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.

Dandridge does not apply to the present case. *Dandridge* involved an interest in welfare payments, a form of governmental largesse, which historically has received less judicial solicitude than education. Compare *Brown v. Board of Education*, 347 U.S. 483 (1954) with *Jefferson v. Hackney*, 92 S. Ct. 1724 (1972). Our national tradition of public education is far stronger than the welfare tradition; the emphasis in education has traditionally been the provision of opportunity to obtain goods and services and not on direct dispensation of dollars for that purpose. Unlike welfare, education is compulsory; the state provides it to virtually all children, and it is not a stop-gap emergency to replace private activity. This distinction is amply reflected in the history of the Texas Constitution: welfare traditionally was specifically prohibited, *Jefferson v. Hackney*, 92 S. Ct. 1724, 1726 (1972), while state financed public schools were mandated in every state constitution since 1845. TEX. CONST. Art. VII, §1. See VERNON'S ANN. TEX. CONST., p. 373 (1955). Additionally, *Dandridge* did not involve a classification by wealth: all those on the welfare rolls were poor, the law under attack merely drew lines by family size among poor people. The state

did not create large families, but the state did create school districts which are poor.

More fundamentally, however, defendants ignore the fact that education is not exclusively an economic and social welfare issue. Mr. Justice Stewart carefully avoided sweeping all interests within the "social welfare" category:

[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families.

Dandridge, 397 U.S. at 484. Specifically, education, as distinguished from welfare, does affect the rights of free association and speech guaranteed by the Bill of Rights; it enables the individual to understand ideas and concepts, it protects his political associations, it gives him the ability to communicate with his fellow citizens. See Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 350 (1972). Cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Epperson v. Arkansas*, 393 U.S. 97 (1968). Education, most importantly the learning of language, is a precursor to cognition, perception, and communication. See generally Langer, *Philosophy in a New Key* (1951).

While, no doubt, the First Amendment protects uninformed, unpersuasive, and possibly unintelligible speech, the meaningful exercise of that right, enabling the speaker to convince and persuade, is dependent upon his ability to speak intelligently and knowledgeably. This is the essence of free speech guarantee. It is not the act of vocalizing meaningless sounds that is the

raison d'être for judicial protection; rather it is the process of exchanging ideas for the purpose of gaining "wisdom in action." Meikeljohn, *Free Speech and Its Relation to Self-Government* 25 (1948). "It is... the best process for advancing knowledge and discovering truth." Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 881, (1963). Or as Thomas Jefferson confidently stated in his First Inaugural Address in 1801:

If there be any among us who would wish to dissolve this union or to change its republican form, let them stand undisturbed as monuments of the safety with which *error of opinion may be tolerated, where reason is left free to combat it.*

House Document No. 218, 87th Cong. 1st Sess., *Inaugural Addresses of the Presidents of the United States*, 14 (1961). See also *Schneider v. State*, 308 U.S. 147, 161 (1939); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis concurring); Letter from Thomas Jefferson to James Madison, December 20, 1787, in 12 *The Papers of Thomas Jefferson* 438, 442 (Boyd, ed. 1950).

The effect of the Texas financing scheme, providing the children in poor districts with an inferior educational opportunity, is to deprive them — in a systematic, if imperfect, way — of an equal ability to communicate in a meaningful fashion, and thereby to diminish their influence in the political and social processes. See generally Emerson *supra* at 882-884. Moreover, "[i]t is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). See also *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Martin v. City of Struthers*, 319 U.S. 141



(1943). The State of Texas has undertaken an educational effort, involving approximately 2 billion dollars a year, for the purpose, among others, of insuring to itself an informed citizenry, able to communicate and exchange ideas for the betterment of the entire state. Whether or not Texas was obligated to promote the flow of ideas to children, it voluntarily chose to do so. Having made this choice, it must abide by the constitutional dictate of equal protection in administering the public school system. By its adoption and continued implementation of a discriminatory educational financing scheme, Texas denies to its poor and minority group children an equal right to know and to be informed. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). This is particularly tragic since these children, coming from disadvantaged backgrounds, are unlikely to acquire this knowledge on their own within the confines of their environment. They are not afforded the luxury of well-educated parents and friends, nor do they have the option to seek fulfillment of their right to know in the private school market. If an adult has a constitutional right to peruse obscene materials in the home, can it be doubted that it is far more compelling under the present facts for a child to learn about science, American history, and reading and writing? Cf. *Stanley v. Georgia*, 394 U.S. 557 (1969).

Plaintiffs believe that often only the well-educated, articulate citizen is in a position to make himself heard by government. Whether we are speaking of the judicial process, administrative complaint procedures, or a letter to a state representative or Congressman, the educated citizen is at a marked advantage in protecting his rights and seeking changes in governmental policies. Public education, by fixing the parameters

of political discussion by virtue of the values it inculcates and by training its students in communication skills, may well determine the limits of an individual's ability to participate in the political process. This thought is aptly expressed in the Texas Constitution:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

TEX. CONST. Art. VII, §1. See also Meiklejohn, *Political Freedom* 8-92 (1965); Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 893-894 (1963). Moreover, education is distinctly related to the right to vote; for often the uneducated citizen cannot assimilate the battery of conflicting political opinions and cast his vote wisely. As this Court stated in another context,

The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a state might conclude that only those who are literate should exercise the franchise.

Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51-52 (1959). See also *Serrano v. Priest*, 487 P. 2d 1241, 1258 (Cal. 1971). Compare *State of South Carolina v. Katzenbach*, 383 U.S. 301, 333-334 (1966); *Harper v. Virginia State Board of Education*, 383 U.S. 663, 665-666 (1966). By financing education on a discriminatory basis, that is by assuring children in poor districts an inferior educational opportunity, the State

of Texas has greatly disadvantaged these children in their ability to participate in the democratic process. When these children are poor or Black or Mexican-American, this state-imposed burden is heaped upon the disadvantages already suffered by those groups.

This Court has on many occasions indicated the importance of education to both the individual and society. See, e.g., *Healy v. James*, 92 S. Ct. 2338 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Abington School Dist. v. Schemp*, 374 U.S. 203, 230 (1963) (Mr. Justice Brennan concurring); *Brown v. Board of Education*, 347 U.S. 483 (1954); *McColum v. Board of Education*, 333 U.S. 203, 231 (1948) (Mr. Justice Frankfurter concurring); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). The message has not been lost on state courts and lower federal courts. In *Serrano v. Priest*, 487 P. 2d 124 (Cal. 1971), the Supreme Court of California held that education was a fundamental interest. The California Court found support for this proposition by analogy to the voting and criminal process cases (*Harper v. Virginia Board of Elections*, 383 U.S. 663 [1966]; *Griffin v. Illinois*, 351 U.S. 12 [1956]), and by reference to the United States Supreme Court decisions denominating the vital importance of education:

Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. "[E]ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which — to the state — have an enormous and much more varied

significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society—participation, communication, and social mobility, to name but a few.”

The analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is “preservative of other basic civil and political rights...” [Citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)].

See also *Robinson v. Cahill*, 287 A.2d 187 (N.J. 1972); *Van Duzart v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Sweetwater County Planning Committee v. Hinkle*, 491 P.2d 1234 (Wyo. 1971).

There are a myriad of other state and federal cases which have characterized education as a fundamental interest. See, e.g., *Cook v. Edwards*, 341 F. Supp. 307 (D. N.H. 1972); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971); *Hosier v. Evans*, 314 F. Supp. 316 (D. St. Croix 1970). Cf. *Pennsylvania Ass'n Retard. Child v. Commonwealth of Pa.*, 334 F. Supp. 1257 (D. Pa. 1971) (Consent Order); *Alexander v. Thompson*, 313 F. Supp. 1389 (C.D. Cal. 1970); *Marlega v. School Board Directors of Milwaukee*, Civil Action No. 70-C-8 (E.D. Wis. 1970) (temporary restraining order); *Perry v. Grenada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss. 1969); *Wolf v. Legislature of the State of Utah*, Civil Action No. 182646 (3rd Dist. Ct. 1969); *Manjares v. Newton*, 411 P.2d 909 (Cal. 1966); *Piper v. Big Pine School Dist.*, 226 P. 926 (Cal. 1924).

The foregoing cases are significant not only because of the finding of fundamentality, but also because most of these courts have intervened even in the absence of

a suspect classification. The defendants argue on both sides of the issue as to whether or not both a fundamental interest and a suspect classification are necessary to trigger the compelling state interest test: when faced with this Court's holding in *Harper v. Virginia Board of Education*, 383 U.S. 663 (1966) and *Griffin v. Illinois*, 351 U.S. 12 (1956), defendants explain those decisions as premised on the concern for fair criminal procedure and for voting rights and not on the proposition that wealth is a suspect classification. (Appellants' Brief, p. 30). But see *Bullock v. Carter*, 405 U.S. 134 (1972); *Gordon v. Lance*, 403 U.S. 1, 5 (1971). Only three pages earlier, however, defendants asserted that both a suspect classification and a fundamental interest were required to trigger the compelling state interest test, on the premise, *Harper* and *Griffin* necessarily held both that the interests involved were fundamental and wealth was a suspect classification. (Appellants' Brief, p. 27).

Defendants cannot explain *Harper* and *Griffin* on the basis of their operating assumptions. Nevertheless, the Court has *not* held that both a suspect classification and a fundamental interest are necessary. This Court has often applied the compelling state interest test, in the absence of a suspect classification, when a fundamental interest is at stake. See, e.g., *Kramer v. Union Free School District*, 395 U.S. 621 (1970); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

In most cases where courts have declared education to be fundamental, they have held school exclusionary policies unconstitutional as an infringement upon the interest of the individual in education. See, e.g., *Manjares v. Newton*, *supra*; *Piper v. Big Pine School Dist.*,

supra; *Cook v. Edwards, supra*; *Ordway v. Hargrave, supra*. To be sure, a complete denial of all educational opportunity is more compelling than a relative denial. But in view of the magnitude of the differences in the capacity of state-created school districts in Texas to raise education dollars, and in light of the vast disparities in educational expenditures between districts, plaintiffs have surely been injured in a comparable way. A complete denial of all educational opportunity is not necessary to demonstrate an unconstitutional deprivation. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). Can the State of Texas open its doors to the poor, compel their attendance (§21.032, Texas Education Code), and then effectively deprive them of an equal educational opportunity because of their economic status? This Court may affirm the judgment of the court below simply on the theory that education is a fundamental interest which has been denied to children living in poor school districts. There is no compelling reason to justify this discrimination, and the Court need not reach the question of whether a suspect classification is involved in order to affirm.

c. Wealth is a Suspect Classification

The Texas education finance statutes operate to injure children living in poor districts, who, as the lower court found, are usually poor themselves. As this Court has repeatedly emphasized, classifications that unequally burden the poor with respect to the enjoyment of a fundamental interest are constitutionally suspect. See, e.g., *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956). This reasoning

should apply to education just as it has been held applicable to criminal process, the right to vote and the right to travel freely. Because the poor, like racial and ethnic minorities, have been unable to secure basic rights through the legislative process, they have long been viewed as among the "discrete and insular minorities" for whom the Court exercises special solicitude. *United States v. Carolene Products*, 304 U.S. 144, 153 n. 4 (1938). As a result, the child's claim on education dollars turns on relative wealth, just as did the accused man's claim to a transcript, *Griffin v. Illinois*, 351 U.S. 12 (1956); or to an attorney, *Douglas v. California*, 372 U.S. 353 (1963); or a person's claim to vote, *Harper v. Virginia*, 383 U.S. 663 (1966); or to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969). A remedy which protects the poor against such discrimination is similarly called for here.

This case is readily distinguishable from *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom McInnis v. Ogilvie* 397 U.S. 74 (1970) (summary affirmance); and *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd* 397 U.S. 46 (1970) (summary affirmance). "Plaintiffs in *McInnis* sought to require that educational expenditures in Illinois be made solely on the basis of the pupils' educational needs." A. 265. Plaintiffs herein did not pray for such a declaration. An "educational needs" formula is "unworkable", and involves the Court in "endless research and evaluation for which the judiciary is ill-suited." A. 265. The Fourteenth Amendment prohibits discrimination, but mandates no specific remedy. This Court need only declare the Texas School financing system, which discriminates against the poor, is unconstitutional. *Serrano v. Priest*, 487 P. 2d 1241 (Cal. 1971).

Defendants assert that *James v. Valtierra*, 402 U.S. 137 (1971) is fatal to plaintiffs' position. But that case involved no systematic discrimination based upon wealth. A federal statute authorized federal financial assistance for the construction of "low-rent housing projects." 42 U.S.C. §1401, *et seq.* No state was obligated to enact statutory provisions enabling local communities to participate in this program. 42 U.S.C. §1401, *et seq.* Responding to the opportunity created by the federal government, California devised a mechanism for making the necessary governmental decision in each local community. The federal statutes already required that no low-rent housing project could be built "unless the governing body of the locality involved has by resolution approved the application of the public housing agency." 42 U.S.C. §1415(7)(a). California expanded on this requirement by requiring a popular referendum, a mechanism employed by California in a wide variety of decision-making contexts. Referendum was a traditional and democratic method of dealing with decisions of import to a local community. 402 U.S. at 138. Nonetheless, plaintiffs in *Valtierra* contended that the popular referendum was inherently discriminatory against the poor. They contended that many other public matters were subject only to a "permissive" referendum, that is a referendum upon citizen initiative.

The majority of this Court rejected plaintiffs' contention. The classification in question had plainly been created initially by Congress itself — and for an entirely beneficent, non-discriminatory purpose. The State of California had merely responded to the specific opportunity that the federal statute had created when it used this same classification. There was no occasion for California to consider any other types of

governmental decision and whether they should also be subject to referendum; the state was not required to anticipate hypothetical problems. It could reasonably confront each category of decision-making in its turn. So far as the majority of the Court was concerned, California did not in any way discriminate against the poor: "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." 402 U.S. at 141. Moreover, the Court found that the poor had not been singled out for special treatment in relation to low-cost housing:

[A]n examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle. Mandatory referendums are required for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations... California statute books contain much legislation first enacted by voter initiative, and no such law can be repealed or amended except by referendum... Some California cities have wisely provided that their public parks may not be alienated without mandatory referendums...

Thus, *James v. Valtierra* held that California had not discriminated on the basis of wealth. Cf. *Whitcomb v. Chavis*, 403 U.S. 124 (1971). Contrary to the defendants' contention, that case does not stand for the proposition that a state may discriminate against the poor in the absence of a compelling or substantial justification for the discrimination. Not only was there no discrimination on the basis of wealth in *Valtierra*, but the opinion also suggests that housing is not a fundamental interest. This is consistent with *Dandridge v. Williams*, 397 U.S. 471 (1970). Housing is a purely eco-

conomic interest, and, most often, it is a private and not a governmental concern. Education, by contrast, is a fundamental interest with both economic and First Amendment significance. Education in Texas is compulsory; the State is required to set-up and support an educational system (Art. VII, §1, Texas Constitution); state districts are required to support an educational system; and the satisfaction of educational needs generally occurs through governmental activity.

This interpretation of *Valtierra* is amply supported by this Court's later decision in *Bullock v. Carter*, 405 U.S. 134 (1972). In that case, plaintiffs alleged the unconstitutionality of Texas statutes requiring candidates for public office to pay filing fees, often in excess of \$1,000. The Court unanimously held the required payment of these fees unconstitutional. It did so on grounds which expressly recognized the vitality of the doctrine that wealth is a suspect classification under the Equal Protection Clause:

This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee. But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.

Because the Texas filing fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in *Harper*, that the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legiti-

mate state objectives in order to pass constitutional muster.

405 U.S. at 144, 145.

Plaintiffs submit that *Carter* is decisive. Both that case and this involve discrimination in the satisfaction of a fundamental interest. Both cases are addressed to a statutory system which discriminates on the basis of wealth. In both cases, there may be some poor persons who were not disadvantaged — those who, by chance supported affluent candidates or who lived in affluent school districts; but the “reality” is that the poor bore the brunt of the discrimination.

Defendants also argue that it has not been shown that poor people live in poor school districts, and, therefore, cases holding that individual poverty is a suspect classification are not applicable. But see *Robinson v. Cahill*, 278 A.2d 187 (N.J. 1972); *Serrano v. Priest*, 487 P. 2d 1241 (Cal. 1971); *Van Dusartz v. Hatfield* 334 F. Supp. 870 (D. Minn. 1971). Such an argument, as we discussed above, ignores the findings of the lower court and attempts to retry this case *de novo* before the United States Supreme Court. Were we to assume that the poor do not live in poor districts, that is that property values do not accurately reflect personal income (but see deposition of defendants’ witness John Stockton, p. 21), defendants’ contention would still be without merit. *Van Dusartz v. Hatfield*, 334 F. Supp. 870, states,

... [t]he objection to classification by wealth is in this case aggravated by the fact that the variations in wealth are State created. This is not the simple instance in which a poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the State itself has defined and commissioned. The heaviest burden of this

system surely fall *de facto* upon those poor families residing in poor districts who cannot escape to private schools, but this effect only magnifies the odiousness of the explicit discrimination by the law itself against all children living in relatively poor districts.

334 F. Supp. at 875-876.

10. RATIONAL BASIS TEST.

The defendants have failed "to establish a reasonable basis" for a classification which denies an equal educational opportunity to children living in poor districts. (A. at 266). Under the rational basis test the Court is concerned with the precise nature of the governmental interest asserted and of the individual interest of those who claim to have been disadvantaged. *Bullock v. Carter*, 405 U.S. 134 (1972). The decision in *Weber v. Aetna Casualty and Suerety Co.*, 92 S. Ct. 1400 (1972), stated that:

the tests to determine the validity of state statutes under the Equal Protection Clause had been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose . . . The essential inquiry in all the foregoing cases is, however, inevitably a dual one: 'What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?'

92 S. Ct. 1400, 1404-1405. The process then involves a weighing of the conflicting interests over a continuum, with the Court deciding which interest should be given the greater credence under the facts and circumstances at hand. Thus, even where the compelling state interest test is held inapplicable, it does not follow that any state interest, however attenuated and

insignificantly related to the object of the legislation, automatically passes constitutional muster. The unanimous decision in *Reed v Reed*, 404 U.S. 71 (1971) made this point:

A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

404 U.S. at 76. See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972).

In *Reed v. Reed*, 404 U.S. 71 (1971), the State of Idaho had enacted legislation providing that "males must be preferred to females" in the designation of persons to administer intestate estates. 404 U.S. at 76. The state defended the statute by arguing that it eliminated the need in many cases for the probate courts to choose among conflicting claims to letters of appointment. The workload of the probate courts would thereby be reduced. A unanimous Court rejected this contention without resort to the compelling state interest test, while recognizing that the proffered justification was "not without some legitimacy." 404 U.S. at 76. While the classification bore some relationship to the object of the statute, it did not have "a fair and substantial relationship" to that object. See *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Implicit in the Court's holding was that there were other means by which disputes over administration of the estate of one who dies intestate could be eliminated without relying upon an arbitrary classification by sex.

Weber v. Aetna Casualty & Surety Co., 92 S. Ct. 1400 (1972), closely resembles *Reed* in its application

of the rational basis standard. In *Weber*, the Court held a Louisiana law, denying "dependent unacknowledged, illegitimate children" recovery under the Louisiana Workmen's Compensation laws on an equal footing with dependent legitimate children, violated the Equal Protection Clause of the Fourteenth Amendment. The Court did not assert that the law was utterly devoid of rationality. Instead, it looked to both sides of the equation, and held that the State of Louisiana could find other means to encourage legitimate family relationships, means which were less detrimental to the illegitimate children who had no responsibility for the illicit liaison.

11. THE TEXAS FINANCING SYSTEM SCHEME SERVES NO COMPELLING OR RATIONAL STATE INTEREST

The Texas school financing plan is unconstitutional under both the rational basis test and the compelling state interest test under the Equal Protection Clause of the Fourteenth Amendment. The court below held:

Not only are defendants unable to demonstrate compelling state interest for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications.

Appendix at 266. Platitudes about the longevity of the present scheme will not suffice. Nor will appeals to local control, a goal which plaintiffs share. Texas' current method of funding the public schools does not minimize administrative difficulties; it does not maintain effective local control; it does not encourage diversity; it does not guarantee equality. It serves no purpose except to make wealth the basis for determining the allocation of educational dollars.

Defendants contend that the purpose of the Texas financing scheme is to guarantee a minimum education

to every child in Texas, while permitting some districts to offer a superior educational opportunity when they choose to do so. They assert that the ability to supplement the minimum program is an important aspect of local control of education, a form of educational governance which has received wide public and judicial support.

As plaintiffs have demonstrated, the State of Texas does not provide a minimum educational opportunity, unless one defines that minimum as simply the lowest level of expenditure in the State. Moreover, implicit in the defendants' argument, is a recognition that the State must offer at least some minimal education to the residents of poorer districts when it offers a superior education to the State's other citizens. Any lesser proposition — involving a power to cut off education altogether on a discriminatory basis — would indeed be unthinkable. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (dicta). Yet, what is this minimum? How is it to be defined? Where does the notion of minimum find constitutional support? How is it compatible with the Fourteenth Amendment's prohibition of discrimination by the state? Defendants offer no hint of an answer; they would apparently lead the Court into an unmanageable semantic inquiry, based on an unexamined assumption that only some of the educational offering is essential.

Beyond these difficulties, defendants completely miss the point of the present litigation when they assert that each district has the opportunity to enrich its educational offering. The point of this lawsuit is the poor districts *do not have the choice*. Educators and economists have long understood that only some districts

really control their educational offering, that only some communities are fiscally capable of supplementation. See National Educational Finance Report, *Future Directions for School Financing* 3 (1971) (Funded by United States Department of Health, Education and Welfare, Office of Education); See Special Committee on School Finance of the National Legislative Conference, *A Legislator's Guide to School Finance* (1972); Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355, 1375-1376 (1971); J. Thomas, R. Jewell, and A. Wise, *Full State Funding of Schools* 1-2 (Paper prepared for the Education Commission of the States, March, 1970); Advisory Commission on Intergovernmental Relations, *State Aid to Local Government* 4-6 (1969); A Commission Staff Report Submitted to the President's Commission on School Finance, *Review of Existing State School Finance Programs* (1971); Weiss, *Existing Disparities in Public School Finance and Proposals for Reform* (1970) (Research Report No. 46 to the Federal Reserve Bank of Boston); Coons, Clune, and Sugarman, *Private Wealth and Public Education* (1971); Guthrie, Kleindorfer, Levin, and Stout, *Schools and Inequality* (1971); President's Commission on School Finance, *Schools, People & Money* (1972); Berke, Campbell, and Goettle, *Revising School Finance in New York State* (1971) (Final Report to the New York Commission on the Quality, Cost and Financing of Elementary and Secondary Education).

The evidence in this case fully documents the vast disparities among school districts in fiscal capacity to support education. Poor Texas districts often have less than one-tenth the taxable wealth of rich districts. The Andrews Independent School District, for example, has

almost \$400,000 per pupil in assessed market value per student, while the Mission Independent School District has a tax base of less than \$10,000 per pupil. (A. 77, 96). This means that poor districts must tax themselves at extraordinary rates in order to raise a fraction of the educational dollars expended in affluent districts. For poor districts to raise the same amount of educational dollars as rich districts, exorbitant tax rates would be necessary. For example for the Edgewood School District to offer to its students the same level of education afforded to the students of the Alamo Heights School District, it would be required to set its tax rate at \$5.76 per \$100 assessed valuation, or more than eight times the rate of neighboring Alamo Heights. (A. 218. See also A. 228, A. 229).

All of the virtues of local control — choice with respect to educational expenditures, the opportunity to provide diverse school experiences—are luxuries available only to rich districts, to districts with the fiscal capacity of Alamo Heights. Poor districts — like Edgewood — do not choose to spend less for education; they do not value education less; they do not prefer other municipal services. Poor districts spend less on education because they are financially incapable of doing otherwise. Those districts which have stood ready to make the greatest sacrifices for the education of their children — by taxing themselves at exorbitant rates — are the very ones that have been penalized under existing Texas statutes. Kirp and Yudof, *Serrano in the Political Arena*, 2 YALE REV. OF LAW AND SOCIAL ACTION 142, 144 (1971).

The Texas school financing plan provides local control for only the privileged few. Plaintiffs do not object to pluralism and diversity in educational offerings; rather they attack the debasement of those con-

cepts by a scheme that systematically discriminates against children in poor districts. In a sense, schools without well-trained teachers, without counsellors, and without proper physical maintenance exemplify a form of diversity, but where, as here, those suffering these disadvantages are poor and minority children, who in no sense chose to suffer it, this Court has adamantly refused to cloak the classification with such words of dignity and legitimacy. *McLaurin v. Oklahoma*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938). See also *Van Duzart v. Hatfield*, 334 F. Supp. 870, 876 (D. Minn. 1971).

While defendants implicitly argue that local control of education should be available only to the affluent, there is little doubt that the State of Texas does have a strong interest in decentralizing educational decision-making. However, this interest can be satisfied without penalizing the poor. *Bullock v. Carter*, 405 U.S. 134 (1972), stated that under the rational basis test, a consideration of "other means to protect [a state's] valid interests" is appropriate in determining the constitutionality of a statutory classification. If this Court holds that a state may not discriminate according to wealth in the allocation of educational services, this does not imply that there will be a leveling of educational opportunity, that innovative, "lighthouse" districts must yield to a pervasive mediocrity. For example, "district power equalizing" systems have been proposed which would reward equal district tax effort with equal dollars. Coons, Clune and Sugarman, *Private Wealth and Public Education*, 200-283 (1971). At each rate of taxation a district would be guaranteed a particular level of school revenues. In poor districts, the state could accomplish this by simply grant-

ing subsidies to make up the difference between what the district actually raised and the amount guaranteed by the state. Under this system, poor districts as well as rich districts could undertake innovative and expensive education programs, so long as they were willing to tax themselves in a fashion commensurate with their desire to spend. Diversity would thereby be fostered, and discrimination would not be cloaked in the guise of pluralism.

12. REMEDIES

The prohibition that a state may not discriminate according to wealth does not demand any particular legislative response; it leaves state legislatures free to choose among a host of alternatives for raising and distributing education dollars. A legislature could choose to centralize or decentralize either revenue raising or school governance; it could opt for diversity or uniformity of educational experience, for compensatory education programs designed to aid students with particular characteristics (for example, handicapped or retarded children) or for absolute equality in dollar expenditure. Characteristics of the school district, other than the wealth of its residents, might be taken into account. Such factors as the number of pupils or schools might be appropriate criteria. Extra dollars could be distributed to communities where the cost of providing educational services (most importantly, the cost of attracting qualified teachers) is appreciably higher. Older communities could be compensated for what economists term municipal overburden, the additional costs of welfare and police and fire protection. See Kirp and Yudof, *Serrano in the Political Arena*, 2 YALE REV. OF LAW AND SOCIAL ACTION 142, 145 (1971).

Thus, the remedies which would flow from an affirmation of the lower court are compatible with any legitimate state interest in educational governance. Under all the foregoing plans, the legislature could allow local school districts to make educational policy choices and to fund and administer educational programs. *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).

13. THE INFANCY OF THE VICTIMS SUPPORTS THE CONCLUSION THAT THE TEXAS FINANCING SCHEME IS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

While defendants emphasize the democratic goals of a system in which each community decides whether to enrich its educational offering beyond the state minimum, plaintiffs have demonstrated that enrichment decisions are more a function of community wealth than of community choice. There is, moreover, another fundamental weakness in defendants' argument. Due to the lack of maturity of children and to the laws of the State of Texas (Chapter 827, §42a(2)9, TEX. REV. CIVIL STATUTES (Appendix 1972)), elementary and secondary students are virtually excluded from participation in the political process — most importantly, they do not have the right to vote. See generally *Oregon v. Mitchell*, 400 U.S. 112 (1970); E. Friedenberg, *Coming of Age in America* (1965). If ever there was a powerless group without direct political representation, children constitute such a group. *United States v. Carolene Products*, 304 U.S. 144, 155 n. 4 (1938). As such, they are entitled to the special protection of this Court. *Graham v. Richardson*, 403 U.S. 365, 371-372 (1971). Judge Doyle sitting in the Western District of Wisconsin accurately portrayed their political plight:

[S]tudents... do not vote in school board elections; political redress of their grievances is not open to them; theirs is a situation in which judicial vindication of constitutional protections has been considered particularly appropriate... Cautious counsel to avoid judicial involvement in serious constitutional issues merely because they concern younger people... is neither prudent, expedient or just.

Breen v. Kahl, 296 F. Supp. 702, 708 (W.D. Wis. 1969), *affirmed*, 419 F.2d 1034 (7 Cir.).

It may be argued that children are adequately represented by their parents, but many parents do not bother to vote, and when they do, they are concerned with a whole multitude of issues — some of which may militate toward decisions which are in opposition to the interests of the children. Moreover, even in a situation where there is an identity between the interests of parents and children, as in the present case, the poverty of the school district nullifies the effectiveness of the parents in influencing political decisions. However sympathetic district educational and political leaders may be, however insistent and persuasive the parents, poor districts are systematically incapable of enriching their educational programs.

This Court has often shown concern for the interests of children. See, e.g., *Wisconsin v. Yoder*, 92 S. Ct. 1526 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944). While admittedly this case involves no classification between children and adults but merely between different economic classes of children, the Court should be equally concerned. Children make no decisions about the world into which they are born. They do not choose to be attached to a poor family, they do not choose to

live in a poor school district. Children have no influence on the complex process whereby the state offers them an education. A child born and raised in a poor school district is penalized, not for any errors or decisions of his own making, but for his misfortune in being born into a poor family. He is penalized by the State for the arbitrariness and irrationality of an adult society which refuses to place him on an equal footing with his more affluent peers. In short, he is denied a reasonable opportunity to succeed in life because of his economic status, a characteristic over which he has no control. The parallel between this case and *Weber v. Aetna Casualty & Surety Company*, 92 S. Ct. 1400 (1972), where illegitimate children were denied workman's compensation benefits upon the death of their natural father, is striking. In both cases, children were seriously disadvantaged by the state on account of their status and not their actions. Mr. Justice Powell eloquently articulated the arbitrariness of such a classification:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong-doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as an unjust — way of deterring the parent.

92 S. Ct. at 1406-1407. As in the case of illegitimacy, no child is responsible for his poverty, and penalizing the poor child for the economic status of his parents is unjust and violative of the Equal Protection Clause.

Whether or not a child's status is relevant to welfare, it is certainly relevant to education, the one service provided by the state that is designed to lift the child from his poverty and to permit him — through his own efforts — to achieve socio-economic success.

CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is the appropriate vehicle for striking down the invidious school financing practices of the State of Texas. The Equal Protection Clause forbids class legislation; it dictates that the regulators subject themselves to the same rules that they wish to apply to others. In this fashion, it affords the greatest constitutional protection against arbitrariness and irrationality in governmental decision-making. Mr. Justice Jackson eloquently stated this constitutional principle in his concurring opinion in *Railway Express Agency v. New York*, 336 U.S. 106 (1949):

Invocation of the equal protection clause does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action

so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation...

336 U.S. at 111, 112-113. In Texas, the poor receive one type of education — an inferior education by every measurement, while the affluent are afforded a quite different and superior educational opportunity. This Court should not allow Texas to impose upon a minority what is obviously unacceptable to the majority.

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

Exhibits

Plaintiffs' Exhibit I: Funds Provided Per Pupil Under State System of Financing (Local and State) 1967-68. Calculated from figures furnished by Texas Education Agency (Named Districts) Same as Chart 3 Webb testimony (A. 228).

Plaintiffs' Exhibit II: Funds Provided Per Pupil from Local Ad Valorem Taxes 1967-68. Calculated from figures furnished by Texas Education Agency (Named Districts). Same as Chart 5 Webb testimony (A. 230).

Plaintiffs' Exhibit III: Percent of Anglo-American, Mexican-American, and Negro Students in Each District (1968-69) Named in Suit (A. 76).

Plaintiffs' Exhibit IV: Market Value of Property per Student for Named Districts — Calculated by dividing 1967-1968 market values as provided in Governor's Report by 1967-1968 Enrollment as answered by Texas Education Agency in Interrogatory II(b), Set I. Same as Chart 4 Webb testimony (A. 229).

Plaintiffs' Exhibit V: Chart No. 1 — Basis of Taxation Bexar County School Districts, 1970. Same as Chart 1, Webb testimony (A. 226).

Plaintiffs' Exhibit VI: Median Per Capita Income and Median Income Per Household in Each Named School District.

Same as Chart 2, Webb testimony (A. 227).

Plaintiffs' Exhibit VII: Real Estate Market Values and Education Expenditures (Per Pupil) in Texas School Districts, 1967-68 (A. 77).

Plaintiffs' Exhibit VIII: The Relationship Between District Wealth, Income, Race, and School Revenues—Texas School Districts Categorized by Equalized Property Values, Median Family Income, and State-Local Revenues (A. 198).

Chart I — Expenditures Per Pupil in ADA in Texas (A. 203).

Table II — The Relationship of Districts Wealth to Tax Effort and Tax Yield (A. 205).

Table III — The Relationship Between District Wealth and Highest Tax Effort (A. 206).

Table IV — The Relationship of District Wealth and Highest Tax Effort (A. 207).

Table V — The Relationship Between District Wealth and School Revenues of Texas School Districts (A. 208).

Table VI — The Relationship of District Wealth to Educational Quality (A. 211).

Table VII — Relationship Between District Wealth Income, Race and State-Local Revenues (A. 216).

Table VIII — The Relationship of District Wealth to Tax Effort and Tax Yield (A. 217).

Table IX — Relationship Between District Wealth and Highest Tax Effort (A. 218).

Table X — The Relationship Between District Wealth and School Revenues (A. 219).

Table XI — The Relationship Between District Wealth and Educational Quality Texas School Districts Categorized by Equalized Property Valuation and Selected Indicators of Educational Quality (A. 220).

Plaintiffs' Exhibit IX: Graph I — The Relationship Between District Wealth and State-Local Revenues (A. 199). Plaintiffs' Exhibits VIII and IX are included in Berke testimony with same table, chart and graph designations.

Graph II — The Relationship Between Median Family Income and State-Local Revenues (A. 201).

Graph III — The Relationship Between Per Cent Nonwhite and State-Local Revenue (A. 204).

Graph V — Relationship Between Professional Salaries Per Pupil and Equalized Valuation Per Pupil (A. 212).

Graph VI — The Relationship of Professional Personnel to Equalized Market Value Per Pupil (A. 213).
Plaintiffs' Exhibit X: Expenditures Per Pupil in ADA in Texas (A. 98).

Plaintiffs' Exhibit XI: Answers to Plaintiffs' Interrogatories — Set 1. Named Districts (A. 100).

Plaintiffs' Exhibit XII: Answers to Plaintiffs' Interrogatories — Set 2. Named Districts (A. 173).

Plaintiffs' Exhibit XIII: Interrogatories I — Set 6, Book 1.

Plaintiffs' Exhibit XIV: Interrogatories I — Set 6, Book 2.

Plaintiffs' Exhibit XV: Interrogatories I.

Plaintiffs' Exhibit XVI: Interrogatories I, Set I

Plaintiffs' Exhibit XVII: Interrogatories I

Plaintiffs' Exhibit XVIIIa: The Challenge and the Chance — Report of the Governor's Commission on Public School Education (1968).

Plaintiffs' Exhibit XVIIIb: The Challenge and the Chance (Supplement) Report to Governor's Committee on Public School Education (Dec. 1968).

Plaintiffs' Exhibit XVIIIc: Property Taxes in Texas School Districts — A Study for the Governor's Committee on Public School Education (Charles R. Bartlett, MAI).

Plaintiffs' Exhibit XVIIId: The Challenge and the Chance Research Report Vol. I Public Education in Texas — Perspective Context, and Goals (1969).

Plaintiffs' Exhibit XVIIIe: The Challenge and the Chance Research Report Vol. II, Public Education in Texas — Program Evaluation (1969).

Plaintiffs' Exhibit XVIIIf: The Challenge and the Chance Research Report Vol. II, Public Education in Texas (1969) Report to Governor's Committee on Public School Education.

Plaintiffs' Exhibit XVIIIg: The Challenge and the Chance Research Report Vol. II, Public Education in Texas — Program Evaluation (1969) Report to Governor's Committee on Public School Education.

Plaintiffs' Exhibit XVIIIh: The Challenge and the Chance Research Report Vol. III, Public Education in Texas — Staffing the System (1969) Report to Governor's Committee on Public School Education.

Plaintiffs' Exhibit XVIIIi: The Challenge and the Chance Research Report Vol. IV, Public Education in Texas — The Organizational Structure (1969).

Plaintiffs' Exhibit XIX: Interrogatory I, Set 6, Book 3.

